No. 83-2126

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

THE STATE OF OKLAHOMA,
Petitioner,

v.

TIMOTHY R. CASTLEBERRY

and

ICHOLAS RAINERI,
Respondents.

BRIEF OF RESPONDENTS

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STATEMENT OF THE CASE

Although the statement of the case in the Petition contains an essentially accurate review of the facts of the case, the Respondents would supplement that statement with several important facts that were not mentioned. Respondents would refer to the transcripts of the two trials in the same manner as the Petitioner. The transcript of proceedings held on September 1-2, 1981, wherein both Respondents were tried for possession of contraband found in the suitcases (F-82-227) will be referred to as Tr. I, and the transcript of proceedings held on September 23-24, 1981, wherein Respondent Castleberry was tried for possession of contraband found in the band-aid box (F-82-228) will be referred to as Tr. II.

The arresting officer admitted that he had the situation "under control" at the time back-up officers arrived. (Tr. I, 20). The officer also admitted that at the time of the search of the trunk, both Respondents were not close to the trunk and were either on the ground or at the front of the vehicle with their hands upon it. (Tr. I, 21). He further admitted that at the time of the search neither

Respondents had access to the keys to the vehicle (Tr. I, 21) and at the time of the search he felt no personal jeopardy from the Respondents. (Tr. I, 23). The officer further testified that at the time of the searches, neither Respondent had any opportunity to get into the car themselves so as to reach a weapon or destroy evidence. (Tr. II, 52).

INTRODUCTION

The case at bar involves the warrantless search of containers found in Respondents' automobile. This warrantless search revealed that the containers contained drugs. As Justice BRENNAN, joined by Justice MARSHALL, stated in his dissenting opinion in Illinois v. Gates, 103 S.Ct. 2317 at 2359 (1983):

> "Everyone shares the Court's concern over the horrors of drug trafficking, but under our Constitution only measures consistent with the Fourth Amendment may be employed by government to cure this evil. We must be ever mindful of Justice Stewart's admonition in Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971), that '(i)n times of unrest, whether caused by crime or racial conflict or fear of internal subversion, this basic law and the values that it represents may appear unrealistic or 'extravagant' to some. But the values were those of the authors of our fundamental constitutional concepts.' Id., at 455, 91 S.Ct., at 2032 (plurality opinion). In the same vein, Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942), warned that '(s)teps innocently taken may, one by one, lead to the irretrievable impairment of substantial liberties.' Id., at 86, 62 S.Ct. at 472."

Searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment, subject only to

a few specifically established and well-delineated exceptions. Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed. 576 (1967).

The exceptions are jealously and carefully drawn, and there must be a showing by those who seek exemption that the exigencies of the situation made that course imperative. Coolidge v. New Hampshire, supra. Thus it is encumbent on the Petitioner to show why the warrantless search of Respondents' automobile and its contents was permissible in the case at bar. The Petitioner would seek exemption from the Warrant Clause of the Fourth Amendment through the "automobile exception" and "search incident to arrest exception" to the requirement that all searches be sanctioned by warrant. Your Respondents would urge that, under the facts of the case at bar, neither of these exceptions would justify the search.

SUMMARY OF ARGUMENT

According to the principles of United States v. Ross, 456 U.S. 798 (1982), Arkansas v. Sanders, 442 U.S. 753 (1979), and United States v. Chadwick, 433 U.S. 1 (1977), the facts of the case at bar do not present an "automobile exception" case allowing the warrantless search of the Respondent's automobile, and all containers therein. Assuming, arguendo, what Respondents do not concede. . . that sufficient probable cause existed for any search. . . such probable cause would have been directed solely towards the containers actually searched, i.e., the suitcases and the band-aid box, prior to their contact with the automobile, and their subsequent contact with the automobile becomes purely coincidental. As the Respondents' containers carried an expectation of privacy, and were in the exclusive control of the police at the time of the search, the determination of whether the privacy interests of these containers should be invaded, whether located in an auto or any other public place, should have been left to the judgment of a neutral and detached magistrate. Failure to allow such a determination by a

magistrate requires that any evidence contained in the items searched be suppressed.

The "automobile exception" cannot be used to support the warrantless search of Respondents' automobile because it lacked the requisite mobility at the time of the search to justify the exception, and because no probable cause existed to believe that the automobile, as opposed to the containers therein, concealed contraband. The Respondents' automobile was not stopped upon a highway nor occupied by Respondents at the time of their arrest. To the contrary, the vehicle was locked and parked in a private parking lot, with the keys in the sole and exclusive possession of the police, at the time of the search. The vehicle not being mobile or occupied at the time of the arrest and search, no exigency existed to justify not procuring a warrant. In addition, the confidential informant told the officer nothing about the automobile save its description and the state it was licensed in. There was no information that the auto contained drugs or was being used to transport drugs. The only information provided about drugs was that the informant had seen drugs in the motel room, and that some

were contained in suitcases. The Respondents would submit that such information is insufficient to provide probable cause to believe the automobile contained drugs, as opposed to the containers searched.

The warrantless search of the band-aid box located in the interior of the parked and locked vehicle cannot be justified as coming under the "automobile exception" to the Fourth Amendment Clause, or as a search incident to a lawful arrest under "per se" rule of New York v. Belton, 453 U.S. 454 (1981).

As in the case of the suitcases located in the trunk of the vehicle, the automobile exception will not operate to justify the search of the band-aid box because there was no probable cause to believe the automobile, as opposed to the containers inside it, contained contraband. The information provided by the informant supplied nothing about the vehicle but its make and license plate. The limited information provided facts which pertained only to seeing drugs in a motel room and in certain containers. In addition, the vehicle was never mobile on a street or highway, but parked and locked in a private parking lot, thereby lacking the

requisite mobility which justifies the exception in the first place. Finally, once the band-aid box had been reduced to the exclusive control of the police, no exigency existed which justified the police in not securing a warrant to search the box. United State v. Ross, supra.

The search of the band-aid box cannot be justified as a search incident to a lawful arrest, even under the broad and expansive "per se" rule of Belton, supra, because the Respondents were not occupants of the vehicle at the time of the arrest or search, the passenger compartment was not within reach of the arrestees at the time of the search, and the box had been reduced to the exclusive control of the police. Thus the search far exceeded the permissible scope of a search incident to a lawful arrest, as delineated in Chimel v. California, 395 U.S. 762 (1969) and reaffirmed in Belton, supra. The fact that the vehicle was parked and locked, with the keys thereto in the exclusive custody of the police, coupled with the fact that the Respondents were restrained by handcuffs and pointed weapons at the time of the search, makes it abundantly clear that there was no

possibility that the arrestees could have reached into the interior of the car to procure a weapon or destroy evidence.

Although Respondents recognize that a tension exists between the exclusionary rule and the interests of law enforcement, it is urged that the United States Supreme Court should not consider elimination or modification of that rule, as that issue was not pressed or passed on by the Oklahoma Court of Criminal Appeals in the case at bar. Since the record below was not compiled with that question in mind, and the Oklahoma Court of Criminal Appeals was not asked to consider proposed changes in existing remedies for unconstitutional acts, it would be inappropriate for the Supreme Court to consider such changes for the first time on appeal. In addition, the Oklahoma Court has not been given the opportunity to rest its decision on adequate and independent state grounds. The exclusionary rule is an issue which greatly divided the public and generates strong sentiments on both sides, adhering to the "not pressed or passed on below" rule of Cornwell v. Randell, 10 Pet. 368, 9 L.Ed. 458 (1836), would better serve to promote respect for

the adjudicatory process and stability of Supreme Court decisions.

The interests of Amicis and Petitioner in promoting a body of law which makes police effort more effective should not be gratified at the expense of substantial demise of the rights of privacy our founding fathers forged through the enactment of the Fourth Amendment to the United States Constitution, and which this Court has nurtured and protected over decades of attack by government. We should remember that the rights secured by the Fourth Amendment are for the protection of all citizens, innocent and guilty alike, and should not be sacrificed in the sole interest of promoting efficient law enforcement.

ARGUMENT

PROPOSITION I

THE "AUTOMOBILE EXCEPTION" TO THE WARRANT REQUIREMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION DOES NOT JUSTIFY THE WARRANTLESS SEARCH OF SUITCASES LOCATED IN THE TRUNK OF A PARKED AND LOCKED VEHICLE.

It is respectfully urged that the Oklahoma Court of Criminal Appeals was correct in holding that the mere fact that the suitcases in question had been placed in the trunk of a vehicle did not justify their warrantless search pursuant to the "automobile exception" to the warrant requirement of the Fourth Amendment to the United States Constitution first announced in Carroll v. United States, 267 U.S. 132 (1925), absent probable cause to search the vehicle itself.

While the Petitioner suggests that the Oklahoma Court of Criminal Appeals' ruling is "at odds" with this Court's ruling in United States v. Ross, 456 U.S. 798 (1982), it is the Respondents' position that the Oklahoma Court of Criminal Appeals' holding is entirely consistent with Ross, supra, as well as Arkansas v. Sanders, 442 U.S. 753 (1979) and United States v. Chadwick, 433 U.S. 1 (1977).

In Ross, supra, the police received information from a reliable confidential informant that a certain described individual was selling narcotics out of the trunk of a certain vehicle parked at a specific location. The informant told the police that he had seen this person sell drugs taken from the trunk, and that the individual had told him that he had additional drugs in the trunk of the vehicle. The police went to the location and found the described vehicle parked as predicted, but did not see the individual described by the informant. The officers left the area, and on their return they spotted the vehicle driving down the street with the described dealer at the wheel. After stopping the car and getting the individual out of it, a bullet was seen on the front seat of the car. A search of the car's interior revealed a pistol in the glove compartment, and the individual was placed under arrest and handcuffed. The officers then took the keys and opened the trunk, where a brown paper bag was found. Upon opening the bag, the police found glassine slips containing white powder. The paper bag was replaced and the car taken to the police station, when a more thorough search revealed a zippered leather pouch which contained

cash. The white powder proved to be heroin and was used to prosecute the individual. No warrant was obtained before the search at the arrest scene or at the police station. The Ross Court ruled that this was an "automobile exception" case, and the paper bag and leather pouch could be searched without a warrant.

The Ross Court squarely addressed the question "whether, in the course of a legitimate warrantless search of an automobile, police are entitled to open containers found within." 102 S.Ct. 2168. The Court considered "the extent to which police officers -- who have legitimately stopped an automobile and who have probable cause to believe that contraband is concealed somewhere within it -- may conduct a probing search of compartments and containers within the vehicle whose contents are not in plain view". 102 S.Ct. at 2159. (Emphasis added.)

The Court answered these questions by holding that, in the above situation, the police "may conduct a search of the vehicle that is as thorough as a magistrate could authorize in a warrant 'particularly describing the place to be searched.' " 102 S.Ct. at 2159.

In reaching this holding, the Court began with a review of the decision in Carroll, supra, itself. After discussing the historical rationale upon which the "automobile exception" was founded, i.e., the mobility of automobiles and the impracticality of securing a warrant in those circumstances where an automobile is stopped upon a highway and the police have sufficient probable cause to believe contraband is being concealed in or transported by the automobile, the Court concluded that the scope of the exception to the warrant requirement applies "only to searches of vehicles that are supported by probable cause. In this class of cases, a search is not reasonable if based on facts that would justify the issuance of a warrant, even though a warrant has not actually been obtained." 102 S.Ct. at 2164.

While it may be argued that this holding rejects the "exigent circumstances" rationale for the automobile exception by not specifically mentioning it in conjunction with the requirement of probable cause, it is equally logical that the requirement of "exigent circumstances" is inherent in any application of the automobile exception, and is

presumed to exist whenever the mobility of a vehicle necessitates bypassing the warrant requirement.

This argument seems more likely in view of the fact that the decision in Ross was apparently directed only toward mobile vehicles in which the police have probable cause to believe contain contraband. It is clear that Justice MARSHALL believed the Ross decision to be so limited, because, in his Ross dissent, 102 S.Ct. at 2173, he states: "The Court confines its holding today to automobiles stopped on the highway which police have probable cause to believe contain contraband. I do not understand the Court to address the applicability of the automobile exception rule announced today to parked cars." 102 S.Ct. at 2174.n.1.

In Ross, as in Carroll, probable cause to search arose while the car was mobile and in circumstances where, due to that mobility, obtaining a warrant prior to the initial encounter with the car would have been impractical. Thus, "exigent circumstances", as required by Carroll, supra, Chambers v. Maroney, 399 U.S. 42 (1970), and Coolidge v. New Hampshire, 403 U.S. 443 (1971), did exist in Ross, and the Court's failure to specifically note this fact does not

necessarily mean that all pretenses of adherence to an "exigent circumstance" theory in automobile cases has been dropped. To the contrary, if any application of the automobile exception is presumed to require the existence of exigent circumstances, even if backward in time to the initial contact with the vehicle, then the Court's mentioning probable cause alone only emphasizes the strength of the probable cause requirement needed in addition to exigent circumstances. To reason otherwise would, as suggested by Justice MARSHALL, 102 S.Ct. at 2176, create a new probable cause exemption to the warrant requirement without a satisfactory justification for abandoning the preference for warrants. The word "automobile" would indeed become a "talisman in whose presence the Fourth Amendment fades away and disappears." Coolidge v. New Hampshire, 403 U.S., at 461-62.

In the case at bar, there can be no question that the vehicle searched was not mobile when the police encountered it. The car was parked in a motel parking lot, empty and locked. At the time of the search, the Respondents were restrained with handcuffs and armed

guards and the police had exclusive possession of the keys to the vehicle. At this point in time, the vehicle was no more mobile than a fixed storage building, and there was no reason for the police to by-pass the warrant clause of the Fourth Amendment. As the Court stated in Carroll, 45 S.Ct. at 285, and restated in Ross, 102 S.Ct. at 2163, the automobile "exception" is to the general rule that "(i)n cases where the securing of a warrant is reasonably practicable, it must be used". It is urged that it was reasonably practical for the police to have secured a warrant in the case at bar, and having failed to do so requires suppression of the evidence. It should also be noted that each of the cases cited by the Petitioner in support of the "automobile exception" theory had facts which showed probable cause to search the vehicle itself plus some exigency which rendered securing a warrant impracticable. None of the cases cited involved a parked and locked vehicle, secured at the time of the search, which the police had no probable cause to search.

Assuming that the fact that the police in Ross encountered the vehicle while it was being driven down a

street and thus securing a warrant was impractical satisfied Carroll's requirement of exigency, the decision in Ross can be analyzed in terms of the Court's requirement of probable cause and what locus that probable cause is directed toward. The Ross Court clearly held that in order for the automobile exception to justify the warrantless search of containers in a vehicle stopped on a highway, probable cause must have existed to search the vehicle independent of the containers in it. Requiring that probable cause exist to search the vehicle itself makes Ross a logical extension of Carroll, for in that case, the police had probable cause to believe that the car contained illegal liquor somewhere within it, although the police were not sure just where in the car it was located. Carroll did not reach the issue of whether a closed container could be searched, because no containers were found in the car. In Ross, the police had probable cause to believe drugs were located in the trunk of the car, but no information that drugs were located in a particular container. If, in Carroll, the police had encountered a container which could have held the object of their search but about which they had no information, they could clearly

have searched that container under the rationale of Ross. The probable cause ran to the vehicle as opposed to the container, and would have encompassed the vehicle and any container found within it. If, on the other hand, the police in Carroll had been told that the defendant possessed illegal liquor located in a box, a warrant would have been required to search that box under the Ross decision, even if the box had been located in an automobile that the defendant was driving.

That the "automobile exception" requires probable cause to search an automobile before containers therein can be likewise searched is made more clear by the Ross Court's analysis of United States v. Chadwick, supra, and Arkansas v. Sanders, supra.

In United States v. Chadwick, supra, federal railroad officials in San Diego became suspicious of a footlocker being shipped to Boston because it was unusually heavy and leaked talcum powder, a substance used to hide the odor of marijuana. Notified of these facts, narcotics agents in Boston met the train, intercepted the footlocker, and used a police dog to detect the presence of the contraband. The

agents did not seize the footlocker at this time, however, but waited until Chadwick arrived and the footlocker was placed in the trunk of his automobile. Before the engine was started, the officers arrested Chadwick and his companions, took the footlocker and his automobile to the Boston Federal Building, where, sometime later, it was opened without a warrant and a large amount of marijuana found. In ruling that the warrantless search of the footlocker was unjustified, the Court recognized that "a person's expectations of privacy in personal luggage are substantially greater than in an automobile", 97 S.Ct. at 2484, and reaffirmed the general principle that closed packages and containers may not be searched without a warrant. "In sum, the Court in Chadwick declined to extend the rationale of the 'automobile exception' to permit a warrantless search of any movable container found in a public place." 102 S.Ct. at 2166. Although the agents had probable cause to believe the footlocker contained contraband, once the footlocker was taken to the Federal Building and was in the "exclusive control" of the authorities, no exigency existed requiring its immediate

search, and thus a search could not be lawfully made without a warrant. "When no exigency is shown to support the need for an immediate search, the Warrant Clause places the line at the point where the property to be searched comes under the exclusive dominion of police authority." 433 U.S., at 2482.

In Arkansas v. Sanders, supra, the Court dealt with facts similar to Chadwick, except in this instance a piece of luggage, which police had probable cause to believe contained marijuana, was carried in the trunk of a taxi in which Sanders was a passenger. After observing Sanders place the suitcase in the trunk of the cab and begin to drive away, the police stopped the taxi and ordered the driver to open the trunk. The driver complied and the police immediately conducted a warrantless search of the unlocked suitcase which revealed a large quantity of marijuana which was later used as evidence against Sanders.

The Sanders Court faced the issue of whether the "automobile exception" of Carroll controlled to allow a warrantless search, or whether Chadwick's "exclusive control" doctrine invalidated the search. In deciding that

the case fell on the Chadwick side of the line, the Court reasoned that the luggage of Sanders carried an "expectation of privacy" which could not be invaded without a warrant once the police had the luggage within their "exclusive control". Rejecting the argument that the luggage's contact with the automobile brought it within the "automobile exception" of Carroll, the Court stated:

> "A closed suitcase in the trunk of an automobile may be as mobile as the vehicle in which it rides. But, as we noted in Chadwick, the exigency of mobility must be assessed at the point immediately before the search -- after the police have it securely within their control. See 433 U.S., at 13. Once the police have seized a suitcase, as they did here, the extent of its mobility is in no way affected by the place from which it was taken. Accordingly, as a general rule there is no greater need for warrantless searches of luggage taken from automobiles than of luggage taken from other places." 99 S.Ct. at 2590.

Thus, as the opinion in Ross makes clear, what the police have probable cause to search determines whether a particular fact situation is a "container case", as in Chadwick and Sanders, or an "automobile exception" case, such as Carroll and Ross. If the police have probable cause to search an automobile, the "automobile exception" applies,

but if probable cause extends only to a container, then the police must secure a warrant to search it because of the owner's reasonable expectation of privacy in that container.

The Petitioner submits that the "automobile exception" should apply in the case at bar because probable cause existed which would have justified a magistrate in issuing a search warrant to search the automobile. Respondents would urge that, under the facts known to the arresting officer, there was insufficient probable cause to justify the arrest of Respondents, much less justify the search of Respondents' vehicle.

While Illinois v. Gates, 103 S.Ct. 2317 (1983), eliminated the "two-pronged test" of Spinelli v. United States, 89 S.Ct. 584 (1969), as rigid requirements to be met in evaluating the sufficiency of an informant's tip for probable cause purposes, this Court agreed with the Illinois Supreme Court "that an informant's 'veracity', 'reliability' and 'basis of knowledge' are all highly relevant in determining the value of his report." Gates, supra, at 2327. The Court stated that these issues are relevant considerations in the "totality of circumstances" analysis

that would henceforth govern the determination of probable cause sufficiency. A close examination of the information provided by the informant, even that information corroborated by the officer, reveals that it is unlikely that a magistrate would have deemed sufficient probable cause present.

Officer Taylor admitted that the informant in the case at bar did not identify himself, that he had never used the informant before, and had no basis for judging him to be reliable. (Tr. I, 18). The only basis of knowledge presented was the bare assertion that he had personally seen drugs contained in suitcases in Respondents' motel room. Having no established track record as a credible and reliable person, indeed, not having even been identified, there is no basis for believing he had seen drugs anywhere, and his information becomes no more probable than an anonymous tip. While it is admitted that the officer was able to verify some of the informant's information, the facts corroborated are entirely innocent in nature and present not the slightest hint of criminal activity. The name and description of the Respondents, their room number, and car and luggage

descriptions would be available to anyone working at the motel in question, and perhaps anyone who had been in the Respondents' room, as an invited guest or otherwise. There was no information provided that would indicate that the informant could recognize illegal substances or was lawfully in the room to have seen what he claimed. Contrary to the facts in Gates, supra, there was no prediction of future activity, and no suspicious activity by Respondents observed by the officer. At the time the officer pulled his weapon and denied the Respondents their freedom of movement, he had observed nothing more suspicious than the Respondents leaving their motel room with their luggage. It is respectfully urged that the observations of the officer at this time would not justify the arrest of the Respondents, as he had not observed any facts or actions which would suggest even a reasonable suspicion of criminal activity.

What probable cause did exist, whether sufficient or not, was most certainly directed at the containers carried by the Respondents, and not the automobile the containers were placed into. The informant gave no indication that he had seen drugs in any automobile and knowledge of the

vehicle's make and license plate, the only mention of the vehicle, serves only to corroborate that the Respondents were staying at the motel in question, and is certainly not sufficient to support a finding of probable cause to search it.

Every objective fact known to the officer suggested the containers as suspected locus of the contraband as opposed to the vehicle. The informant had told the officer of seeing drugs in the motel room and that some were contained in certain described suitcases. Respondents did not begin loading the automobile until some "five or ten minutes" after beginning his surveillance of the motel room (Tr. I, 8), so the drugs allegedly observed in the motel room had to be contained in the items placed in the vehicle or still remained in the room itself. The officer did not "smell" the odor of marijuana until the suitcases had been placed in the trunk of the vehicle, and it is interesting to note that the officer "wanted to make sure that there was actually marijuana in the suitcase" before he officially placed the Respondents under arrest. (Tr. I, 31) (Emphasis added.) Aside from undermining the degree of certainty that the

officer had, indeed, smelled marijuana, the statement points to the suitcases as the suspected location of the marijuana in the officer's own mind.

Respondents also urge that some deference should be paid to the Oklahoma Court of Criminal Appeals' finding of fact that "(T)he suspected locations of the contraband were the suitcases and the band-aid box which Castleberry threw into the car", (Joint Appendix, p. 36), as opposed to the automobile generally, as urged by the State of Oklahoma. As was stated in Aguilar v. Texas, 84 S.Ct. 1509 (1964), reviewing courts "will pay substantial deference to judicial determinations of probable cause . . . ." 84 S.Ct. at 1512. The Oklahoma Court of Criminal Appeals determined that probable cause existed to search the suitcases and band-aid box, but not the automobile generally. "In a fact-bound inquiry of this sort, the judgment of . . . state courts . . . should be entitled to at least a presumption of accuracy." Justice STEVENS and Justice BRENNAN, dissenting, Illinois v. Gates, 103 S.Ct. at 2361-62.

In the case at bar, as in Sanders and Chadwick, supra, "(I)t was the luggage being transported by respondent at the

time of the arrest, not the automobile in which it was being carried, that was the suspected locus of the contraband. The relationship between the automobile and the contraband was purely coincidental, as in Chadwick. The fact that the suitcase was resting in the trunk of the automobile at the time of respondent's arrest does not turn this into an 'automobile' exception case. The Court need say no more. (Citations omitted)." Chief Justice BURGER, concurring opinion to Arkansas v. Sanders, supra, as adopted in United States v. Ross, 102 S.Ct. at 2166-67.

It is respectfully urged, therefore, that the warrantless search of the suitcases located in Respondents' car trunk cannot be justified under the "automobile exception" because the police lacked probable cause to search the vehicle itself and no exigent circumstances existed which rendered securing a warrant impracticable. This is simply not an "automobile exception" case, but rather a "container" case which required a warrant to search the suitcases.

PROPOSITION II

THE SEARCH OF THE BAND-AID BOX FOUND IN THE FRONT SEAT OF THE VEHICLE WAS UNJUSTIFIED UNDER THE AUTOMOBILE EXCEPTION OR AS A SEARCH INCIDENT TO A LAWFUL ARREST.

Respondents would urge that the warrantless search of the band-aid box found in the front seat of the parked and locked vehicle cannot be justified under the "automobile exception" to the Fourth Amendment Warrant Clause any more than the warrantless search of the suitcases located in the trunk. As discussed previously in regard to the suitcases, neither the suitcases nor the band-aid box were discovered in the course of an ongoing search of a lawfully stopped vehicle. There was never any probable cause to search the vehicle itself, but rather, the containers placed in the vehicle, and their contents, were the object of the search. As Justice POWELL stated in his concurring opinion in Robbins v. California, 101 S.Ct. 2841 (1981), as restated in United States v. Ross, supra, "when the police have probable cause to search an automobile, rather than only to search a particular container that fortuitously is located in it, the exigencies that allow the police to search the entire

automobile without a warrant support the warrantless search of every container found therein." 101 S.Ct. at 2859, 102 S.Ct. 102 at 2618. In the case at bar the police had, at best, probable cause to search the band-aid box and suitcases prior to their contact with the automobile. The police searched the vehicle solely to gain access to the objects of the search (the containers and their contents) without probable cause as to the vehicle itself, and thus, under the principles of Ross, Sanders and Chadwick, supra, this is simply not an "automobile exception" case. In addition, it makes no difference that the band-aid box is a more or less likely spot to hide objects from public view. "The scope of a warrantless search of an automobile is thus not defined by the nature of the container in which the contraband is secreted. Rather, it is defined by the object of the search and the places in which there is probable cause to believe it may be found." Ross, 102 S.Ct. at 2172. The object of the search in the case at bar was drugs, and the place where the police had probable cause to believe they were located were the containers placed in the automobile, not the automobile itself.

The Petitioner would urge that the warrantless search of the band-aid box can be justified as a search "incident to a lawful arrest". Respondents realize that this Court has long recognized that the Fourth Amendment permits a warrantless search incident to a lawful arrest. While there is no question that the person of the arrestee may be so searched, the permissible scope of a search of the place where the arrest is made has not been easily defined. (Emphasis added.) In Chimel v. California, 395 U.S. 752 (1969), the Court attempted to delineate the proper bounds of such a warrantless search. In Chimel, supra, the defendant was arrested in his home for the burglary of a coin shop. For approximately an hour after the arrest, the police conducted a detailed search of defendant's entire house, finding several items of evidence that were later used against him. The police were armed with a warrant for the defendant's arrest, but had no warrant to search defendant's house. The Court ruled the the search and seizures were unlawful, because the search exceeded the permissible scope of a search incident to defendant's arrest. The Court found that the Fourth Amendment set forth a

preference for prior judicial approval of searches, and any exceptions to the warrant requirement are limited in scope by the justifications allowing the initiation of the search. The Court stated:

> "When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or an evidentiary item must, of course, be governed by a like rule. A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in clothing of the person arrested. There is ample justification, therefore, for a search of the arrestee's person and the area 'within his immediate control' — construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence." Chimel, 395 U. S. at 762-763.

In New York v. Belton, 453 U.S. 454 (1981), however, the Court significantly expanded the authority of police officers to conduct warrantless searches of automobiles and their contents, even in the absence of probable cause to believe seizable items will be found. Belton held that, as an

incident to the custodial arrest of an occupant of an automobile, the police may search the passenger compartment of the automobile and any containers found therein. (Emphasis added.) In Belton, an officer stopped an automobile occupied by four persons for speeding on an open highway. While questioning the driver regarding ownership of the vehicle, the officer detected the odor of burnt marijuana. He also saw an envelope commonly used to sell marijuana, marked "Supergold", on the floorboard of the vehicle. The officer ordered the men out of the car and arrested them for possession of marijuana. The officer then searched the persons of each occupant, and, after separating them, examined the envelope and found it to contain a small amount of marijuana. He then searched the passenger compartment of the vehicle, including five jackets located on the back seat. Inside the zippered pocket of the jacket belonging to Belton, the officer found a small amount of cocaine. It was the search of this jacket that was the issue before the Court, and it held that the search of the jacket pocket was valid as incident to the custodial arrest of an occupant of the vehicle where the jacket was found.

Although departing from the case by case analysis used to determine the validity of searches incident to arrest under Chimel and adopting, instead, a "per se" rule intended to cover all searches incident to the arrest of occupants of vehicles, the Court did not break from the rationale of Chimel. The Court stated that "Our holding today does no more than determine the meaning of Chimel's principles in this particular and problematic context. It in no way alters the fundamental principles in the Chimel case regarding the basic scope of searches incident to lawful custodial arrests." 453 U.S. at 460 n.3.

Following the rationale of Chimel, the Court reasoned that, in regard to an occupant of a vehicle, articles inside the passenger compartment are "in fact generally, if not inevitably, within 'the area into which an arrestee might reach in order to grab a weapon or evidentiary item.'" Belton, 453 U.S. at 460 (quoting Chimel, 395 U.S. at 763.) The Court stated that "if the passenger compartment is within reach of the arrestee, so also will containers in it be within his reach." 453 U.S. at 460. (Emphasis added.)

Taken within the context of the facts of Belton, where one officer had stopped a vehicle occupied by four persons on a major highway, and where neither the occupants nor their property had as yet been reduced to the exclusive control of the police, the Court's "per se" rule would seem to logically support the rationale of Chimel. In the case at bar, however, the Respondents were not occupants of the vehicle or even recent occupants thereof; the vehicle was parked and locked in a parking lot with the police in the exclusive control of the keys, and more than one officer had the Respondents restrained under armed guard. At the time of the search, there was not the slightest possibility of the Respondents procuring a weapon or destroying evidence from the interior of the case. The rationale of Chimel being absent, the "per se" rule of Belton would not operate to justify the warrantless search of the vehicle as incident to a lawful arrest.

It is important to note that the Belton court found neither Chadwick nor Sanders, supra, to be relevant, but rather distinguished them on the ground that "neither of those cases involved an arguably valid search incident to a

lawful custodial arrest", 453 U.S. at 461-462, because the footlocker in Chadwick was in the exclusive control of the police at the time of the search and the luggage of Sanders was not within the "immediate control" of the defendants at the time of the search. 453 U.S. 462. The case at bar does not involve an "arguably valid" search incident to a lawful arrest, because the band-aid box, as well as the suitcases, were in the exclusive control of the police and not within the "immediate control" of Respondents at the time of the search.

It is urged that the fact that the vehicle was locked at the time of the search has special significance in light of the Court's holding in Belton. If the vehicle is locked, the interior of that vehicle is placed in much the same position as the trunk of the vehicle. Insofar as searches incident to the arrest of occupants of a vehicle are concerned, the trunk of the automobile has been specifically excluded by the Court in Belton. 453 U.S. at 460-61 n.4. If the vehicle is locked, and particularly if the keys are in the exclusive control of the police, then the interior of the vehicle, like the trunk, would almost certainly be outside the immediate

control of the arrestee. This is true because of the time it would take, and the difficulty he would have, in attempting to unlock and open it in order to obtain a weapon or to destroy or conceal evidence.

It is further urged that the decision in Belton, supra, must be read in light of the Court's subsequent decision in United States v. Ross, supra. As Ross grants the police significant authority to conduct warrantless searches of automobiles and their contents upon probable cause, it would seem that Ross would have the effect of limiting the intrusiveness of Belton and undermining the reasoning for its holding. Ross requires probable cause to search automobiles and containers therein, while Belton permits searches of the passenger compartment and its containers incident to an automobile occupant's arrest, for any offense, regardless of probable cause, even if the presence of weapons is unlikely and evidence of a crime non-existent. Belton thus requires far less justification for invasions of automobile privacy than does Ross. Justice STEVENS, in his concurring opinion in Belton, argued that the search should have been upheld under the automobile exception as opposed to the search

incident to arrest theory. Fearing that the Belton rule could lead to police abuse by allowing searches based on arrests for even the most petty offenses where the police had no reason to believe evidence was contained in the automobile, STEVENS contended that Belton would grant authority to search far exceeding the scope permitted by the automobile exception. He stated: "Under the Court's new rule, the arresting officer may find reason to (take the driver into custody and thereby obtain justification for a search of the entire interior of the automobile) whenever he sees an interesting looking briefcase or package in a vehicle that has been stopped for a traffic violation." 453 U.S. at 452. Since such an extensive search would be precluded under the automobile exception of Ross unless the officer had probable cause to believe that the vehicle contained contraband or other evidence of a crime, Justice STEVENS's concerns about the expansiveness of Belton would seem to be satisfied. It is urged that, in light of Ross, the far-reaching rule of Belton is unnecessary and ought to be reconsidered. Although the Respondents contend that the warrantless search of the band-aid box and suitcases

contained in the locked vehicle cannot be justified under Belton or Ross, it is urged that the Court abandon the "per se" rule of Belton and return to the stated rationale of Chimel, allowing the police, upon making a lawful custodial arrest, to search an automobile and any containers therein whenever, under the facts of the particular case, they are " within (the arrestee's) immediate control — construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence". Chimel, 395 U.S. at 763. In light of the Court's subsequent decision in United States v. Ross, supra, failure to so modify Belton would seem to render it superfluous.

It is respectfully urged, therefore, that neither the "automobile exception" or search "incident to arrest" theory would justify the warrantless search of the band-aid box.

PROPOSITION III

THE UNITED STATES SUPREME COURT SHOULD NOT CONSIDER ELIMINATION OR MODIFICATION OF THE FEDERAL EXCLUSIONARY RULE BECAUSE THE ISSUE WAS NOT PRESSED OR PASSED ON BELOW.

The Petitioner would argue that the exclusionary rule should not be applied in the case at bar, even if a Fourth Amendment violation occurred, for a number of reasons. See Petitioner's Brief, pages 32-35. It should be noted, however, that the State of Oklahoma never raised or addressed the issue of whether the federal exclusionary rule should be modified in any respect in the Oklahoma Court of Criminal Appeals, and that the Oklahoma Court never considered the question. It is urged, therefore, that this Court should not consider the question.

The so-called "not pressed or passed on below" rule arose from Corwell v. Randell, 10 Pet. 368, 9 L.Ed. 458 (1836), wherein the Supreme Court held that Section 25 of the Judiciary Act of 1789, which gave birth to the Supreme Court's certiorari jurisdiction over decisions from state courts through 28 U.S.C. Section 1257, furnished the Court with no jurisdiction unless a federal question had been both

raised and decided in the state court below. Whether the "not pressed or passed on below" rule is jurisdictional, State Farm Mutual Automobile Insurance Co. v. Duel, 324 U.S. 154 (1945), or merely a prudential restriction, Terminiello v. Chicago, 337 U.S. 1 (1949), Vachon v. New Hampshire, 414 U.S. 478 (1974), consideration of whether the exclusionary rule should be eliminated or a "good faith" exception allowed to provide for warrantless searches of containers found in public places would be contrary to the sound justifications for the rule.

The purposes underlying the rule are as applicable to the State of Oklahoma's failure to have opposed the assertion of a particular federal right as is a party's failure to have asserted the right initially. First, "questions not raised below are those on which the record is very likely to be inadequate since it certainly was not compiled with those questions in mind." Cardinale v. Louisiana, 394 U.S. 437, 439. Second, "due regard for the appropriate relationship of this Court to state courts," McGolrick v. Compagnie Generale, 309 U.S. 430, 435-436 (1940), requires that those courts be given an opportunity to consider the

constitutionality of the actions of its police officers, as well as proposed changes in existing remedies for unconstitutional acts. Finally, requiring the State of Oklahoma to first argue modification of the federal exclusionary rule to Oklahoma courts allows the state court to rest its decision on adequate and independent state grounds. Cardinale v. Louisiana, supra, at 439.

As did the lower court in Illinois v. Gates, 103 S.Ct. 2317 (1983), the Oklahoma Court of Criminal Appeals applied the federal exclusionary rule as a routine act once a violation of the Fourth Amendment had been found, and, as there was no contest on the issue of whether the facts of the case warranted a modification of the exclusionary rule, same was not considered or ruled upon. Since there was no adversarial contest before the Oklahoma court reaching the exclusionary rule's application or modification, the Supreme Court should not consider such a question at this time. "Where difficult issues of great public importance are involved, there are strong reasons to adhere scrupulously to the customary limitations on our discretion", Illinois v. Gates, supra, and by doing so the Court promotes respect for its adjudicatory process and the stability of its decisions.

PROPOSITION IV

THE COURT'S DECISION IN UNITED STATES v. ROSS IS SUFFICIENTLY CLEAR TO PROMOTE EFFECTIVE LAW ENFORCEMENT AND FURTHER EXPANSION IS UNWARRANTED.

Both Petitioner and Amici ask the Court to extend the Court's decision in Ross to eliminate any distinction between automobiles and closed containers in the interest of promoting efficient law enforcement and judicial economy.

Respondents would urge that such an extension would extract too high a price in the loss of long recognized rights of privacy, heretofore protected by the warrant requirement of the Fourth Amendment, to justify those ends.

The Bill of Rights is a profoundly antigovernment document, and it is urged that the framers of that document intended that it make governmental interference in an individual's rights of privacy as inconvenient as possible. The founding fathers never intended that the judgment of a police officer be substituted for a neutral and detached magistrate, for they knew that the impairment of substantial individual liberties would result. To grant further authority to police officers to conduct warrantless

searches would only serve to "obliterate one of the most fundamental distinctions between our form of government, where officers are under the law, and the police-state where they are the law." Johnson v. United States, 68 S.Ct. 367 at 370.

The bright line rule asked for by Petitioner and Amici . . . that "once there is probable cause to search a car, the police may search any container within any part of the car". . . is exactly what the Court's ruling in Ross provides. It is sufficiently clear to be understood by law enforcement and private citizens alike. To grant broader warrantless search power to police will only serve to whet the evergrowing appetite of law enforcement, to the end that soon the Fourth Amendment warrant requirements for searches and seizures of personal affects outside the home would be non-existant.

Effective law enforcement is an insufficient reason for sacrificing constitutionally protected interests, and it is urged that this Court refrain from granting expanded powers to government at the expense of the fundamental rights of its citizens.

CONCLUSION

For the reasons stated, it is respectfully urged that this Court affirm the judgment of the Oklahoma Court of Criminal Appeals.

Respectfully submitted,

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